

No. 15454

United States
Court of Appeals
for the Ninth Circuit

PACIFIC CAGE AND SCREEN CO., a corporation,
PET DEALERS SUPPLY COMPANY, a corporation,
MERCHANTS PET SUPPLY COMPANY, a corporation and
JOHN MIDDELKOOP, Appellants,

vs.

CONTINENTAL CAGE CORPORATION,
Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 96, inclusive)

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

JUN 21 1957

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee:

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* Page numbers appearing at bottom of page of original Transcript of Record.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 20084-HW

CONTINENTAL CAGE CORPORATION,
a corporation, Plaintiff,
vs.

PACIFIC CAGE AND SCREEN CO., a corpo-
ration; PET DEALERS SUPPLY COM-
PANY, a corporation; MERCHANTS PET
SUPPLY COMPANY, a corporation; and
JOHN MIDDELKOOP, Defendants.

COMPLAINT FOR INFRINGEMENT OF
UNITED STATES LETTERS PATENT
No. Des. 177,326

Plaintiff, complaining of defendants, avers as fol-
lows:

I.

Plaintiff, Continental Cage Corporation, is a Cal-
ifornia corporation having a regular and estab-
lished place of business at Culver City, California,
within this judicial district.

II.

Defendant, Pacific Cage and Screen Co., is, upon
information and belief, a California corporation
having a regular and established place of business
at Los Angeles, California, within this judicial dis-
trict.

III.

Defendant, Pet Dealers Supply Company, is, upon information and belief, a California corporation having a regular and established place of business at Huntington Park, California, within this judicial district. [2]

IV.

Defendant, Merchants Pet Supply Company, is, upon information and belief, a California corporation having a regular and established place of business at Los Angeles, California, within this judicial district.

V.

Defendant, John Middelkoop is, upon information and belief, a citizen of the State of California and resides in Los Angeles County within this judicial district.

VI.

This action arises under the Patent Laws of the United States of America and this Court has jurisdiction thereof under 28 USC 1338(a) and 1400(b).

VII.

On April 3, 1956, United States Letters Patent No. Des. 177,326 were duly and legally issued to plaintiff, Continental Cage Corporation, for an invention in "Bird Cage", by virtue of mesne assignment from the applicant, Sidney Herman, and ever since said date said plaintiff has been, and now is, the owner of said Letters Patent. Profert of said Letters Patent is hereby made.

VIII.

Plaintiff, Continental Cage Corporation, did give written notice to the defendants, and each of them, on April 26, 1956 to cease infringing the said Letters Patent.

IX.

Defendant, Pacific Cage and Screen Co., has been and is infringing these Letters Patent by making, using, and selling bird cages embodying the patented invention, and defendants Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop have been infringing these Letters Patent by selling bird cages manufactured by the Defendant, Pacific Cage and Screen Co., and all of these defendants will continue to do so unless enjoined [3] by the Court.

Wherefore, plaintiff, Continental Cage Corporation, prays the Court for a judgment against the defendants as follows:

1. That the defendants, their agents, servants, employees and attorneys, and all persons in active concert and participation with them be severally and jointly enjoined temporarily during pendency of this action, and permanently after final hearing, from the infringement of United States Letters Patent No. Des. 177,326.

2. That the defendants be required to pay over and account to plaintiff for all gains, profits, and advantages derived from the infringing acts of defendants.

3. For damages sustained by plaintiff by reason of defendants' infringement.

4. That the minimum amount of Two Hundred Fifty Dollars (\$250.00) for the infringement of said Letters Patent be paid by defendants.

5. That the defendants pay to plaintiff the costs of this action allowed to plaintiff by the Court and reasonable attorney's fees.

6. That plaintiff have such other and further relief as is just.

CONTINENTAL CAGE CORPORATION,

/s/ By ROBERT M. OTIS, SR.,
Plaintiff.

/s/ THOMAS P. MAHONEY,
Attorney for Plaintiff. [4]

Duly Verified.

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR
PRELIMINARY INJUNCTION AND
POINTS AND AUTHORITIES IN SUP-
PORT THEREOF

Plaintiff moves the Court for issuance of an injunction to forbid, restrain, and enjoin the defendants, their officers, agents, employees, and representatives, during the pendency of this action or until

further order of this Court, from infringing United States Letters Patent No. Des. 177,326.

In support of this Motion, plaintiff submits the complaint and the affidavit and points of authorities appended hereto.

Dated: This 22nd day of June, 1956.

/s/ THOMAS P. MAHONEY,
Attorney for Plaintiff.

Notice of Motion

To the Defendants:

Please Take Notice that the plaintiff will bring the above motion for issuance of a preliminary injunction on for hearing [6] before the Hon. Thurmond Clarke, U. S. District Judge, in this courtroom in the U. S. Courthouse at Los Angeles, California, on the 9th day of July, 1956, at 11 a.m. o'clock, or as soon thereafter as counsel can be heard.

/s/ THOMAS P. MAHONEY,
Attorney for Plaintiff. [7]

AFFIDAVIT OF ROBERT M. OTIS

State of California,
County of Los Angeles—ss.

Robert M. Otis, being duly sworn, deposes and says that:

1. I am the President of Continental Cage Corporation, a California corporation, located at and doing business at 11446 Knightsbridge Avenue, Culver City, California.

2. I have engaged in the manufacture and sale of bird cages under United States Letters Patent No. Des. 177,326.

3. Continental Cage Corporation is the assignee of United States Letters Patent No. Des. 177,326.

4. I have inspected the infringing products manufactured and sold by the defendants.

5. The infringing products, and particularly the "Coronado" design, are substantially identical in appearance with the design of the cage disclosed in United States Letters Patent No. Des. 177,326.

6. The infringing acts of the defendants have had a damaging effect on the business of Continental Cage Corporation and further and continuing infringing by the defendants will cause irreparable harm to Continental Cage Corporation.

/s/ ROBERT M. OTIS SR.

Subscribed and sworn to before me this 22nd day of June, 1956.

[Seal] MIRIAM H. AULD,
Notary Public in and for the above County and
State. My Commission Expires Aug. 31, 1958.

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

To the Defendants, Pacific Cage and Screen Co.,
Pet Dealers Supply Company, Merchants Pet
Supply Company, and John Middelkoop:

Plaintiff having filed its complaint and a Motion
for Preliminary Injunction, together with Affi-
davits in support of said Motion, and good cause
appearing:

It Is Ordered that defendants appear before the
Hon. Thurmond Clarke, Judge of the U. S. District
Court, in the courtroom of said Judge in the U. S.
Courthouse at Los Angeles, California, on the 9th
day of July, 1956, at 11 a.m. o'clock then and there
to show cause, if any they have, why the defendants
and their officers, agents, employees, and other rep-
resentatives should not be forbidden, restrained,
and enjoined, during the pendency of this action
and until further order of this [11] Court, from in-
fringing upon United States Letters Patent No.
Des. 177,326.

It Is Further Ordered that a copy of said Com-
plaint, Motion for Preliminary Injunction and Affi-
davits in support of said Motion, and this Order be
served upon defendants forthwith.

Dated: This 22nd day of June, 1956.

/s/ LEON R. YANKWICH,

Judge, U. S. District Court. [12]

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

AFFIDAVITS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

In support of its Motion for Preliminary Injunction on file herein, Plaintiff submits the attached supplementary affidavits of Robert M. Otis, James S. Hanks, George J. Meyer, and Albert A. Ardmore.

Dated: At Los Angeles, California this 9th day of July, 1956.

/s/ THOMAS P. MAHONEY [13]

SUPPLEMENTARY AFFIDAVIT OF
ROBERT M. OTIS

State of California,
County of Los Angeles—ss.

Robert M. Otis, being duly sworn, deposes and says that:

1. I am the President of Continental Cage Corporation, a California corporation, located at and doing business at 11446 Knightsbridge Avenue, Culver City, California.

2. I have conducted a thorough investigation of, and I am fully familiar with, the products manufactured by Pacific Cage and Screen Co.

3. While Pacific Cage and Screen Co. has sold large numbers of its Coronado model and other

cylindrical bird cage models alleged to infringe United States Design Letters Patent No. 177,326, the total volume of said sales constitutes a relatively small portion of the entire sales of Pacific Cage and Screen Co. and an injunction preventing the sale of such bird cages would not be of material or irreparable harm to the defendant Pacific Cage and Screen Co.

4. I am also familiar with the line of products manufactured by Customcraft Industries, Inc. and know that that company manufactures a wide variety of bird and animal cages and that, while it has manufactured a substantial number of infringing Show Piece and other cylindrical model cages, the bulk of the production and sales of Customcraft Industries, Inc. is in other lines and other designs of cages.

5. Therefore, if a preliminary injunction were to issue on the Motion for Preliminary Injunction made herein, irreparable harm would not be caused to Customcraft Industries, Inc. in view of the fact that it does not depend wholly, or to any significant extent, on the manufacture and sale of the alleged infringing Show Piece and other model cages.

6. However, the plaintiff Continental Cage Corporation has confined its endeavor primarily to the manufacture of cylindrical [14] type bird cages and the infringing acts of the defendants, and each of them, have severely injured the competitive position of the plaintiff and irreparable harm and damage will be caused to the plaintiff if the defendants

are permitted to continue their willful and wanton infringement of said Letters Patent No. Design 177,326 during the period prior to and including the trial of this action.

/s/ ROBERT M. OTIS.

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ MIRIAN H. AULD,
Notary Public in and for the above County and
State. My Commission Expires Aug. 31, 1958.

AFFIDAVIT OF JAMES S. HANKS

State of California,
County of Los Angeles—ss.

James S. Hanks, being duly sworn, deposes and says that:

1. I reside at 4719 West 170th Street, Lawndale, California.

2. I was the Sales Manager of the animal cage division of Customcraft Industries, Inc. for the year extending from April, 1955 to April, 1956.

3. I am now the Sales Manager for Continental Cage Corporation of Culver City, California.

4. During my sales experience with animal cages of various types, I became quite familiar with all types of cylindrical bird cages.

5. I have actually purchased samples of Pacific Cage and Screen Co's Coronado model of a cylindrical bird cage and have compared the same with

the bird cage shown in United States Design Letters Patent No. 177,326 and I am of the opinion that the design of the Coronado model is an outright infringement of said patent in view of its incorporation of all of the essential features of the patent.

6. Furthermore, the designs of the Coronado and the bird cage shown in the patent are confusingly similar to such an extent as to delude and mislead ordinary purchasers who would attempt to distinguish between the designs of the two cages.

7. I am also familiar with the No. 8200 Series Show Piece floor model cylindrical bird cage manufactured by Customcraft Industries, Inc. and have compared the design of said cage with that shown in the above referenced patent, No. 177,326, and I am of the opinion that the two designs are substantially the same.

8. I am further of the opinion that the No. 8200 Series cage of Customcraft Industries, Inc. is so similar to the cage shown in [16] said patent as to confuse and mislead the ordinary purchaser into thinking that it is a cage manufactured in accordance with the teachings of said patent.

/s/ JAMES S. HANKS.

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ MIRIAM H. AULD,

Notary Public in and for the above County and State. My Commission Expires Aug. 31, 1958.

AFFIDAVIT OF GEORGE J. MEYER

State of California,
County of Los Angeles—ss.

George J. Meyer being duly sworn, deposes and says that:

1. I reside at 10951 Fairbanks Way, Culver City, California.

2. I have been engaged for over a year in the sale of bird cages, operating independently, and as a salesman for the Ardmore Pet Supply Co., Baldwin Products, and other manufacturers of bird and animal cages.

3. During my employment in this manner, I have had an opportunity to become familiar with the shapes and sizes of all types of bird and animal cages customarily marketed to pet shops, pet distributors, and the like.

4. I have also had an opportunity to study the design of the cage shown in Design Letters Patent No. 177,326 and I am of the opinion that the design disclosed therein is highly novel and I have not encountered, until recently, bird cages of such design.

5. I have had an opportunity to compare the design disclosed in the above referenced patent with the Coronado model cylindrical bird cages manufactured by Pacific Cage and Screen Co. and I am of the opinion that the design of the Coronado cage is an outright copy of the design disclosed in said Design patent No. 177,326.

6. Furthermore, I am of the opinion that the similarity of designs is such as to confuse the ordinary purchaser of such bird cages and I, myself, have considerable difficulty in distinguishing between the two cages.

7. Furthermore, I have also studied the Customcraft Industries, Inc.'s cage manufactured and sold by Customcraft Industries, Inc. under Series No. 8200, Show Piece model, and have compared the design of said cage with that of the cage disclosed in the above patent. [18]

8. While there are certain minor distinctions in appearance between the Customcraft Industries, Inc.'s Show Piece model and the cage disclosed in said patent, I am of the opinion that the over-all appearance of the two cages is substantially identical and so close as to confuse an ordinary purchaser and delude said purchaser into thinking he was purchasing the cage of the patent when purchasing the Show Piece model.

/s/ GEORGE J. MEYER.

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ KENNETH E. KAYDEN,
Notary Public in and for County of Los Angeles,
State of California. My Commission expires
Nov. 22, 1959. [19]

AFFIDAVIT OF ALBERT A. ARDMORE

State of California,
County of Los Angeles—ss.

Albert A. Ardmore, being duly sworn, deposes and says that:

1. I reside at 10538 Bradbury Road, Los Angeles, California.

2. I was formerly a distributor of bird and animal cages for Customcraft Industries, Inc., Pacific Cage and Screen Co., Reliance Sales Co., and others.

3. As the distributor of such bird and animal cages, I have become quite familiar with the various types of cages manufactured and sold by the bird cage industry.

4. I have had an opportunity to study the disclosures of United States Design Letters Patent No. 177,326, and particularly the drawing thereof, which shows a cylindrical bird cage which is, in my opinion, highly novel in conception and appearance.

5. I have studied a Coronado model bird cage manufactured by Pacific Cage and Screen Co. and have compared it with the drawing of the bird cage in the above referenced patent and I am of the opinion that the Pacific Cage and Screen Co.'s Coronado model is a flagrant copy of the bird cage disclosed in said patent.

6. From my experience with the trade at large, I am convinced that the ordinary consumer would

be completely confused by the Pacific Cage and Screen Co.'s Coronado model into thinking he was purchasing a cage manufactured in accordance with the teachings of the above referenced patent.

7. Moreover, I have had an opportunity to review the appearance of the No. 8200 Series Show Piece model bird cage manufactured by Customcraft Industries, Inc. and have compared the Show Piece model bird cage with the drawing of the aforementioned patent and have come to the conclusion that the minor variations made in the appearance of the Show Piece model do not clearly distinguish said cage [20] from that disclosed in the patent.

8. I am further of the opinion that the Customcraft Industries, Inc.'s Show Piece model is so similar to that bird cage disclosed in the above referenced patent as to completely confuse a potential purchaser of bird cages and to cause such a purchaser to buy the Customcraft Industries, Inc.'s Show Piece model thinking he was purchasing the bird cage disclosed in said patent.

/s/ ALBERT A. ARDMORE.

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ PATRICE HOFFMAN,
Notary Public in and for the above County and
State. [21]

[Endorsed]: Filed July 9, 1956.

[Title of District Court and Cause.]

OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Now come the defendants and request this honorable Court to dismiss plaintiff's Motion for Preliminary Injunction.

In opposition to the motion, defendants submit the affidavits and points and authorities.

1.

A preliminary injunction should not be granted in a patent infringement suit unless the Court is convinced that the defense is sham. *Gantner vs. Unit Venetian Blind Supply Corp.*, DC SD Cal. 84 USPQ 266.

The affidavit of Robert Kleid discloses that the affiant manufactured and sold bird cages approximately a month prior to the week of July 4, 1954; that he sold a cage embodying the features of the patent in suit to one Sue Kennedy about three weeks prior to the week of July 4, 1954; that he sold twelve cages embodying the patented [22] design in suit on a day of the week of July 4, 1954, one of the twelve cages being sold to Sidney Herman, the patentee of the patent in suit; that Sidney Herman at that time inquired of the affiant concerning the manufacture of the pan for the cage and asked affiant where he secured the tree branches which were in the cages; that to the best of affiant's knowledge he and one Marvin Lulla were the first to produce bird cages of this general type; that to

his knowledge the first cages made by the patentee Sidney Herman, some time after the sale of affiant's cage to Sidney Herman, were copies of affiant's cages.

2.

To grant a preliminary injunction in a patent case it is necessary to find that plaintiff's patent has been adjudicated and found valid and also that defendant will be unable to respond in money damages. *Collins vs. Wallin*, DC Mass. 70 USPQ 34.

Plaintiff has offered no evidence of the adjudication of the patent in suit. The affidavit of Joseph Babros states that plaintiff has widely circulated customers of defendant Pacific Cage and Screen Co., threatening those customers with infringement suits and that these acts have resulted in refusal of customers to purchase that defendant's cages, and that they were committed by plaintiff with full knowledge that affiant, President of Pacific Cage and Screen Co., has been in business many years in Los Angeles and is a responsible business man of good standing and fully capable of satisfying any judgment which might be rendered in this proceeding.

3.

A patent which is applied for by one who is not the inventor is void. *Kennedy vs. Hazelton* 128 US 667.

The affidavit of Robert Kleid, as pointed out above, shows that Sidney Herman, patentee of the patent in suit, was not the inventor thereof but secured the idea from the affiant Robert Kleid.

A preliminary injunction against infringement is not [23] granted unless the patent is beyond question valid and infringed. *Leavitt vs. McBee Co.*, CCA-1 52 USPQ 193.

A preliminary injunction is refused against a design patent where defendant's affidavits and exhibits raise issue as to its validity and plaintiff's proofs fail to show public acquiescence. *Crescendoe Gloves Inc. vs. Rubin*, DC NY 85 USPQ 206.

Not only do the affidavits furnished by defendant raise an issue as to validity but they show invalidity.

The affidavit of Harry Lachman, in Exhibit "A" thereof, shows a bird cage having the general proportions and appearance of that of the patent in suit, which cage was imported from China and has been in the possession of affiant for 10 or 15 years. Exhibit "B" of Mr. Lachman's affidavit is a photograph of another cage which he has had an equal period of time and shows the open work cylindrical shape with the open work flat top. The cage of Exhibit "A" also shows a supporting pan with legs. The affiant Lachman states that he has made cages similar to Exhibit "C" for several years past. From the records of Mr. Lachman there is evidence of the purchase of materials for the cages of Exhibit "C" dated in 1953, more than one year prior to the date of application for the Herman patent in suit.

The affidavit of Solveig Kennedy verifies the purchase by her from the affiant Robert Kleid of a cage embodying the features of the design in suit about three months prior to the termination of her em-

ployment with the Lynch Kirby Company in the third week of August, 1954. This date places the date of purchase about the middle of June, 1954, or as stated by Robert Kleid, about three weeks before the week of July 4, 1954, at which latter time he sold one of his cages to Sidney Herman.

There are other facts supporting the manufacture and sale of cages of the design in suit prior to the application of Sidney Herman which are found in the attached affidavits. John Jamieson verifies the long possession of the Chinese cages by Harry Lachman. [24]

Michael Capobianco verifies the early purchase of cages from Robert Kleid, Marvin Lulla (mentioned by Kleid as having been associated with him), and Herman Shapiro of Dealers Manufacturing Company (corroborated by the Shapiro affidavit). The affidavit of Joseph Babros sets forth that he first saw a cage of the design of the patent in suit in September, 1954, two months prior to the date of application for the patent in suit and that this cage was manufactured by Dealers Manufacturing Company, that Babros had first been requested to manufacture a cage of the design in suit by Germain's Inc., Pet Shop Department, according to instructions supplied by them and that he manufactured such a cage before ever having seen cages made by Sidney Herman or his assignee.

4.

A design patent on a box is not patentable where the design is directed to the proportions of the box

or a box with a rounded cover. Shoe Form Co. vs. Erwin Corp., DC NY 71 USPQ 144.

5.

The cage of the patent in suit is made in the shape illustrated to give the bird more room for movement without increasing the floor space required. That a design is utilitarian does not answer the requirement that it must be original. Hueter vs. Sears, Roebuck Co., DC ND Ohio 91 USPQ 238.

6.

The Court may not only deny the motion for preliminary injunction but may also dismiss the complaint. In Mast Foss and Co. vs. Stover Manufacturing Co., 177 US 485, it was held that the Circuit Court of Appeals could not only reverse an order granted a preliminary injunction but could also direct the Court below to dismiss the Bill of Complaint. [25]

Whereupon defendants move this honorable Court to deny plaintiff's motion for a preliminary injunction and to dismiss the complaint.

July 6, 1956.

Respectfully submitted,

/s/ ALLAN D. MOCKABEE,

Attorney for Defendants. [26]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT KLEID

State of California,
County of Los Angeles—ss.

Robert Kleid, first being duly sworn, deposes and says:

I reside at 15511½ North Poinsettia Place, Hollywood, California, and am employed by a sewing machine store at 1453 Fourth Street, Santa Monica, California.

In 1954 I was employed at Kirby Company of Los Angeles, 522 North La Brea, Hollywood, California.

While employed there I began working with Marvin Lulla and his brother Ronald in the manufacture and sale of bird cages as a side line to my regular employment. I have no records of the cages manufactured and sold, but to the best of my recollection, we began making them in the early part of June, 1954, before Marvin [27] Lulla's brother returned from school in the East for his summer vacation.

During the week of July 4, 1954, there was a sales meeting at the Kirby Company. I remember the particular meeting because of the fact that it was the same week as July 4. I took 12 cages down to the Kirby place that morning and sold all 12 of them to Kirby salesmen. Of that group of 12 cages, the first one I sold the morning of the sales meeting was to Sidney Herman, who was a Kirby salesman at the time. To the best of my knowledge and belief he is the same Sidney Herman who is the patentee

of United States Patent No. Des. 177,326, issued April 3, 1956.

The 12 cages mentioned above, and including the cage I sold to Sidney Herman the week of July 4, 1954, each had a side wall which was cylindrical in shape and formed of wire mesh, known as hardware cloth, the mesh being approximately $\frac{1}{2}$ " square. The cage had a flat wire mesh top and, in proportion it was considerably taller than its diameter. Each of these cages had a bottom pan in which the cylindrical wire portion rested and the pan was supported by three wrought iron rod legs with rubber bumpers on their lower ends. In each cage was a piece of natural wood in the form of a tree branch which served as a perch structure.

Shortly after I sold the cage to Sidney Herman, he inquired about the manufacture of the pan and he asked me where I secured the tree branches. I told him that I went out into the San Fernando Valley and picked them up in wooded areas.

About three weeks before the sales meeting at which I sold a cage to Sidney Herman, I had a cage down at the Kirby place and it had two parakeets in it. Sue Kennedy, who was the bookkeeper there at the time, saw the cage and said that she must have it. I sold it to her at that time, about three weeks before the sales meeting mentioned above, with the two parakeets in it, for \$21.00.

Marvin Lulla and I made some inquiries about the securing [28] of patent protection but I reached the conclusion that there was nothing patentable about the cage.

I sold some of the first cages we made to The Coral Reef bird shop at the Farmers' Market about a month prior to the Kirby sales meeting of the week of July 4, 1954.

To the best of my knowledge, Marvin Lulla and I were the first to produce bird cages of this general type. If Sidney Herman had conceived a bird cage of this type before the Kirby sales meeting of the week of July 4, 1954, I do not believe he would have purchased one from me, particularly in view of the fact that he talked as though he had never seen one like it before and he later asked me questions about how it was made and where some of the materials were secured. Also his first cages, made some time after the above sales meeting, were copies of the cages which Marvin Lulla and I had previously produced.

/s/ ROBERT KLEID.

Subscribed and sworn to before me this 5th day of July, 1956.

[Seal] /s/ THEODORE B. FACH,
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires July 19, 1958. [29]

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH H. BABROS

State of California,
County of Los Angeles—ss.

Joseph H. Babros, first being duly sworn, deposes and says:

I am the President of Pacific Cage and Screen Co. a defendant in the above entitled action with offices at 3110 South Main Street, Los Angeles, California.

In August or September, 1954, a Mr. Johnson, then Purchasing Agent for Germain's Inc. pet shop department, 625 South Hill Street, Los Angeles, California, asked me to make a cylindrical wire mesh bird cage which was tall compared to its diameter, with a flat top and supporting legs. I was busy on other matters and was not particularly interested in making the cage. However, Mr. Johnson brought me the materials necessary for making it and asked me to [30] build the cage.

Because of the pressure of other business in my plant, which included the manufacture of fire place screens, various types of bird cages and other wire products, I did not immediately begin to construct the cage.

On September 24, 25 and 26, 1954, I was present at a showing of bird cages at the Biltmore Hotel in Los Angeles. There I saw a relatively tall cylindrical cage of wire screen with a flat top and supporting legs. This cage was one manufactured by Dealers Manufacturing Co. of Los Angeles. I talked to Mr. Sunderling of The Merchants Pet Supply Co. of Los Angeles. At that time I told Mr. Sunderling that I was not particularly interested in the manufacture of this general type of cage. Mr. Sunderling replied that the cages were selling and that I should make one. His company is one of my distributors and since he seemed to be interested, I

told him that if cages of that size sold well I would, of course, consider manufacturing them.

I did not see any cages of this general type at the show which were manufactured by Continental Cage Corporation and I had not seen any at any other location.

In November of 1954 I completed the cage for Germain's which had been requested by Mr. Johnson. It was made of open wire mesh with a flat top, the legs supported a pan in which the cage proper rested and the top of the cage was made of an inverted pan. These pans were of spun aluminum and the legs were of brass finish.

I did not, in subsequent manufacture of large wire mesh bird cages with cylindrical sides, copy any cage of Continental Cage Corporation but secured my ideas from Mr. Johnson of Germain's, from the cage of Dealers Manufacturing Co. which I saw at the show, and from ideas of my own.

I gave no thought to the possibility that anyone had any type of patent protection on the cages because cylindrical cages are [31] old, it is old to make them of wire mesh or screen, to provide them with flat tops and to put them on legs.

In my plant I have catalogs of other manufacturers. One of them is the catalog of "Hendryx." It is the Hendryx catalog No. 42 bearing the date 1930. Attached hereto are photostat copies of the title page of the Hendryx catalog and pages 2a, 40, 49, 57 and 58. Page 58 shows a small animal laboratory cage, No. 6R, which has a wire mesh side wall of

cylindrical shape and a flat wire mesh top. There is also shown a deep pan in which the cage rests. The top of the cage has a solid metal band about it.

A very similar cage is shown on page 57 of the Hendryx catalog. Page 49 of the catalog shows a cage of cylindrical shape with vertical wires connected by vertically spaced horizontal rings. The cage rests on a shallow pan and the pan is supported by legs.

Page 40 of the Hendryx catalog shows a cage which is cylindrical with a substantially flat top, the cage being made of spaced parallel wires connected by vertically spaced rings.

Page 2a of the catalog shows a cage of spaced parallel wires which is cylindrical in shape. It also has vertically spaced rings connecting the vertical wires, a bottom pan with an upstanding flange to receive the wire portion of the cage and legs upon which the cage may be supported.

The photostats of the Hendryx catalog cages are identified as Exhibit "A" of this affidavit.

Also attached hereto as Exhibit "B" hereof is the cover page of my Company's catalog for August 1, 1938 and page 11 thereof. Page 11 shows a cage of vertical spaced parallel wires connected by vertically spaced rings, the wire portion of the cage resting in a pan, and the pan being supported by three legs.

Continental Cage Corporation, plaintiff in the above entitled [32] action, according to reports received by me, has generally circularized customers

of Pacific Cage and Screen Co., the defendant company of which I am president, threatening those customers with suits for infringement. These acts by plaintiff, company's representatives and counsel have resulted in the refusal of customers to purchase the accused cages made by my company.

These acts were committed by plaintiff with full knowledge that I have been in business many years in Los Angeles and I am a responsible business man of good standing and fully capable of satisfying any judgment which might be rendered in this proceeding.

An example of plaintiff's acts which has irreparably harmed my company is found in the attached Exhibit "C", a photostat copy of a letter dated May 11, 1956 from J. J. Newberry Co., a large chain retailer, forwarding to me a copy of a letter from Thomas P. Mahoney, counsel for plaintiff, dated April 26, 1956. The direct result of Mr. Mahoney's letter to the Newberry Company was the cancelling of all shipments to Newberry and a direction to my company *to all* orders which might have been or might be received from Newberry.

Exhibit "D" is a photostat copy of a letter dated June 8, 1956, from Jim Hanks, Continental Cage Corporation, to Glen Bauerly, Arrow Pet Supply Co., Portland, Oregon, together with an illustrated price list. Arrow Pet Supply is an established purchaser of my company's cages. In his letter, Jim Hanks states that my company has already offered to stop manufacture "provided we will allow them

to get rid of their present commitments." The letter of Mr. Hanks further indicates that plaintiff would not permit defendant Pacific Cage and Screen Co. to do this.

There was some discussion of settlement of the controversy between my company and the plaintiff but Mr. Otis, president of Continental Cage Corporation, stated that he would grant my company a license for \$10,000.00 cash and a royalty of 6% of the amount received [33] on each cage sold by my company. The amount demanded was prohibitive and inasmuch as I felt there was nothing legally patentable about the cage and that Sidney Herman was not the inventor, I elected to defend what I feel are my just and legal rights.

Unless plaintiff is promptly prevented from pursuing a course which is aimed at control of all cages of open wire work which are cylindrical in shape with flat open work tops and supported by legs, irreparable injury will be done, not only to my company, but to others against whom plaintiff has filed suit.

/s/ JOSEPH H. BABROS.

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ KATHLEEN F. McLAREN,
Notary Public, in and for the County of Los Angeles, State of California. My Commission expires April 2nd, 1960. [34]

[Note: Exhibits are set out in the Book of Exhibits.]

[Title of District Court and Cause.]

AFFIDAVIT OF HARRY LACHMAN

State of California,
County of Los Angeles—ss.

Harry Lachman of 11907 Wilshire Boulevard, Los Angeles, California, first being duly sworn, deposes and says:

I am the proprietor of The Patio Workshop, 11907 Wilshire Boulevard, Los Angeles, California, dealer in antiques, wrought iron work, bird cages and miscellaneous home decorations and artistic accessories.

I have, in the course of my business, for many years purchased and sold bird cages of various types. Exhibit "A" attached hereto is a photograph of a bird cage which has been in my possession for at least 10 years last past and probably for 15 years. It is a Chinese import. Its shape is cylindrical and it is tall compared to its diameter. It has a bottom pan supported by legs, a band [47] about the lower side portion, horizontal rings intermediate the top and bottom which, with the spaced vertical members, provide narrow, vertically elongated openings and an open-work flat top.

The attached photograph, Exhibit "B", is that of another Chinese bird cage similar to Exhibit "A" with respect to its cylindrical form, flat open-work top and intermediate horizontal rings with thin

spaced vertical side members. This cage has also been in my possession for 10 years or more.

I have had manufactured for me and have sold tall cylindrical wire bird cages of vertically elongated mesh such as shown in Exhibit "C" attached hereto. It is illustrated on the back cover of the exhibit and bears the numbers 601 and 602. This cage has been sold by me for several years past. They have been made for me by E. W. Frederick who manufactures metal specialties at 6154 $\frac{1}{2}$ Santa Monica Boulevard, Hollywood 38, California. Attached hereto are photostat copies of original invoices in my records, said invoices being from Mr. Frederick for the manufacture and sale to me of cages of Exhibit "A" as follows:

April 15, 1953 No. 1471 1—36" 1"x2" cage;
26—soldered pans.

May 5, 1953 No. 1525 3—18"x36" 1"x2" mesh
cages.

Nov. 18, 1953 No. 1986 3—18"x36" cages, $\frac{1}{2}$ x1"
mesh.

Nov. 23, 1953 No. 1996 51—Soldered pans (pans
for cage bottoms).

Dec. 5, 1953 No. 2013 24—Soldered pans.

Copies of the above invoices are attached hereto and marked Exhibits "D" through "H" in the order given above. [48]

All of the cages and pans referred to in the in-

voices had wire mesh cylindrical sides, bottom pans, and were in the proportions shown in Exhibit "C".

/s/ HARRY LACHMAN.

Subscribed and sworn to before me this 3rd day of July, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public in and for said County and State.
My Commission expires: Mar. 6, 1960. [49]

[Note: Exhibits are set out in Book of Exhibits.]

[Title of District Court and Cause.]

AFFIDAVIT OF SOLVEIG KENNEDY

State of California,
County of Los Angeles—ss.

Solveig Kennedy, first being duly sworn, deposes and says:

I reside at 17911 Welby Way, Reseda, California.

In the summer of 1954 I was employed in the office of Lynch Kirby Company, distributors of Kirby vacuum cleaners located at 522 North La Brea, Los Angeles, California. At the time I was working for the Lynch Kirby Company I was acquainted with Robert Kleid who was also employed by the Company.

One morning at the office of the above Company I saw a bird cage which was brought in by Robert Kleid who said that he had made it. It was a tall, cylindrical, open wire cage with a flat open wire top. It had upper and lower access doors in the side

wall [57] and had an open bottom which fitted into a black metal pan supported by three straight, iron legs which extended downwardly and outwardly from the bottom of the pan and were provided with rubber end pieces. In the cage was a piece of weathered tree branch which extended a substantial distance up in the cage from the bottom to serve as an ornamental perch.

This cage which I saw at Lynch Kirby Company had two parakeets in it at the time. I immediately decided that I wanted the cage and the birds and after talking to Robert Kleid, I purchased the cage with the birds in it for the sum of \$21.00.

I left the Lynch Kirby Company the third week of August, 1954. I remember this clearly because my husband and I then went on a vacation trip in the High Sierra. I purchased the cage and birds from Robert Kleid three months prior to the time I discontinued my employment with the Lynch Kirby Company and it was purchased about the second or third week of June, 1954.

On Monday, July 2, 1956, I was interviewed by Allan D. Mockabee concerning my acquisition of the cage and on that day I turned the cage over to him in return for another cage of a similar type. Until July 2, 1956, the cage in question has been constantly in my possession since its purchase from Mr. Kleid and has been continuously occupied by parakeets. The metal bottom pan has paint scratched from the side near the top of one of the legs, paint has come off the inside of the pan almost entirely around the edge of the bottom. At various

places on the wire side wall of the cage there are white markings from bird droppings and in the cage is a tree branch with dark brown bark, some of which has been removed on laterally extending branches. This branch is a replacement of the original one in the cage when I purchased it from Mr. Kleid. The original branch became soiled from droppings and the one now in [58] the cage was about ready for replacement because it is soiled.

/s/ SOLVEIG KENNEDY.

Subscribed and sworn to before me this 3rd day of July, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public. My Commission expires: Mar. 6,
1960. [59]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN JAMIESON

State of California,
County of Los Angeles—ss.

John Jamieson, first being duly sworn, deposes and says:

I am a resident of Los Angeles County, California, and I am employed by Harry Lachman, proprietor of The Patio Workshop, 11907 Wilshire Boulevard, Los Angeles, California.

I have been employed by Mr. Lachman for a period of approximately 10 years and I am thoroughly familiar with the articles on display at and sold from his show room at the above address, and also,

I am familiar with various types of articles which are manufactured, refurbished and stored in the work rooms at the same address and immediately behind the show room.

I have examined the photographs attached to the affidavit [60] of Harry Lachman and signed by him on the day of, 1956, in connection with the matter of Continental Cage Corporation vs. Pacific Cage and Screen Co., et al., said photographs being marked Exhibits "A" and "B" of Mr. Lachman's affidavit.

Exhibit "A" is a photograph of a bird cage which, to my knowledge, has been in the possession of Mr. Lachman at his place of business during the entire time I have been associated with him in business, or for approximately the past 10 years.

The cage of Exhibit "A" is a cylindrical cage which is tall compared to its diameter. It has a bottom pan supported by legs, a band about the lower side portion, horizontal rings intermediate the top and bottom, and a substantially flat top. The cage's side wall and top are made of small spaced filaments of wood, reed or the like and they are held in position by a bottom ring, vertically spaced intermediate rings and a central top member of wood. The vertical filaments and the vertically spaced rings which connect them give the appearance of an open-work side wall, the openings of which are vertically elongated.

The cage of Exhibit "B" is that of a very similar type. It is cylindrical, has the open-work effect and has a flat open-work top.

Having been familiar with various types of bird cages in connection with the business in which I am engaged, if the cages of Exhibits "A" and "B", and particularly Exhibit "A", are viewed at a reasonable distance, such as when displayed in a shop for sale, the general design of Exhibits "A" and "B" would appear to be that of design patent No. Des. 177,326 granted April 3, 1956 to Sidney Herman on a Bird Cage.

/s/ JOHN JAMIESON.

Subscribed and sworn to before this 3rd day of July, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public in and for said County and State.

My Commission expires: Mar. 6, 1960. [61]

[Title of District Court and Cause.]

AFFIDAVIT OF MICHAEL A. CAPOBIANCO

State of California,
County of Los Angeles—ss.

Michael A. Capobianco, first being duly sworn, deposes and says:

I reside at 2349 Castle Heights Avenue, Los Angeles 34, California, and I am the manager of The Coral Reef, a bird shop, located at Farmer's Market, Third and Fairfax, Los Angeles, Calif.

I have been shown a copy of United States design patent No. Des. 177,326 granted April 3, 1956, on "Bird Cage."

Cages of this general appearance and shape were known to me in the early part of 1954. On June of

1954 I took at least several cages on consignment from Herman Shapiro of Dealer's Manufacturing Company of Los Angeles. These cages were cylindrical and considerably [62] taller than their diameter. They were made of a wire mesh called hardware cloth and the cylindrical mesh cages rested in pans supported by legs of iron rod. They had flat tops of wire mesh. Some of these first hardware cloth cages from Dealer's Manufacturing Company were sold by me and some were returned, probably because they had become shopworn and soiled. I do not have a record of these first cages from Dealer's Manufacturing Company because they were left on consignment and also because there probably was some exchange credit when a short time later Mr. Shapiro furnished me with cages of smooth wire mesh with the openings taller than their width.

Prior to receiving and selling Mr. Shapiro's cages I bought some cages from Robert Kleid, a young fellow who made cages prior to July, 1954. These cages were made of hardware cloth with flat open-work tops. They were higher than they were wide, much in the proportions of the cage of the above identified design patent. The cage proper sat in a pan which was supported by iron legs and in each cage was a piece of manzanita which gave the appearance of a tree and furnished perches for birds in the cage. I clearly recall the hardware cloth material because it was rough and it was easy to scratch oneself on the rough edges where the hardware cloth had been cut to shape the cage. I also clearly recall the supporting pan and legs because

the legs were welded to the pan, the welding operation weakened the material of the pan sometimes and occasionally one of the legs would break through.

An inspection of my business records does not show the earlier purchases of cages from Robert Kleid. They do show a check stub No. 2902 dated July 7, 1954 for the purchase of two cages at \$9.95 a piece and they also show a check stub No. 2936 of July 30, 1954 for payment of \$21.80 to Robert Kleid for two of the cages. There is a stub numbered 2967 dated August 10, 1954 in the amount of \$32.85 for three cages; stub No. 2992 of October 17, 1954 in the [63] amount of \$40.95 for four cages and stub No. 3041 dated Sept. 15, 1954 in the amount of \$21.90 for three cages. These were all purchased from Robert Kleid.

I also purchased cages of the same type as those described in connection with Robert Kleid. My check stub No. 2892 dated July 15, 1954 in the amount of \$9.95 for one cage. This cage and the others purchased from Marvin Lulla were of the same general design as that of the above identified design patent except that they were made of hardware cloth which looked like the material in the cage top of said design patent. Check stub No. 2895 showed payment also on July 15, 1954 to Marvin Lulla of \$9.95 for one cage. I remember that I had made out check No. 2892 and later in the day I had a sale for another cage, so I made out the second check No. 2895 and gave them to Lulla that afternoon. Payment was made as the cages were sold

because I took them from Lulla on consignment. There is another check stub No. 2902 dated July 17, 1954, showing payment to Lulla of \$19.90 for two cages.

The first record I can find of payment to Mr. Shapiro of Dealer's Manufacturing Company is check stub No. 3057 dated Sept. 23, 1954, in the amount of \$108.00 in payment for six cages. My records further show that of these six cages, three were purchased Sept. 11, 1954, two were purchased Sept. 15, 1954 and one was purchased Sept. 18, 1954. These records relate to cages which were secured on invoiced purchases whereas the earlier cages which Dealer's Manufacturing Company furnished me were on consignment and, as I have stated, I do not have any record of them because some were returned and allowances were made in connection with the hardware cloth cages of Dealer's Manufacturing Company which were first furnished to me in about June of 1954 on a consignment basis.

In my sales books, most instances do not show cash sales but they do reflect some of the sales made for out of town shipment. Most of the cash sales are recorded on a register manifold which for [64] that period is rather inaccessible since it is stored at another location. My sales slips for out of town shipment include several during the summer of 1954. They were for cages of the general type shown in the above identified design patent and the type described by me as having been manufactured by one or more of Robert Kleid, Marvin Lulla or Dealer's Manufacturing Company. There is a record

of shipment of a cage to Chris Zimmerman, 215 Linden Place, New Milford, New Jersey on July 17, 1954 at a cost of \$21.90. On July 31, 1954, I shipped one of the cages to Dorothy Evans, 5170 LoGorce Drive, Miami Beach, Florida, at a cost of \$21.90. On August 21, 1954, I have, in my sales book for that period, a record of a sale to Mr. Hurst, 4931 Vista Del Monte, Sherman Oaks, California, of one of the cylindrical cages at a cost of \$21.90.

/s/ MICHAEL A. CAPOBIANCO.

Subscribed and sworn to before me this 3rd day of July, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public in and for said County and State.

My commission expires: Mar. 6, 1960. [65]

[Title of District Court and Cause.]

AFFIDAVIT OF HERMAN SHAPIRO

State of California,
County of Los Angeles—ss.

Herman Shapiro, being first duly sworn, deposes and says:

I reside at 2433 West Washington Boulevard, Los Angeles, California, and I am the proprietor of Dealer's Manufacturing Company, 1451 Toberman, Los Angeles, California, and I am engaged in the manufacture and sale of bird cages.

Early in 1954 I conceived the idea of a cylindrical, flat topped open wire cage of considerably greater height than its diameter, with a metal pan and

legs. I conceived this design of bird cage without having previously seen a cage of this particular type and shape.

In the month of June, 1954, I made five or six cages, using [66] hardware cloth, a wire screen-like material of about $\frac{3}{8}$ or $\frac{1}{2}$ " mesh. I purchased hardware cloth for these first five or six cages for cash at a hardware store and have no record of the purchase. These cages were sold during the month of July, 1954. They were placed with The Coral Reef, bird and pet shop at Farmers' Market, Third and Fairfax, Los Angeles, California on consignment. As I recall it, some were sold and others were returned because I had then begun the manufacture of cages of oblong wire mesh which was more attractive and less rough than the hardware cloth of which the first few cages were made.

Attached hereto and marked Exhibit "A" is a photograph of a cage made by me and my then partner Herman Newitz, who was in business with me from August, 1954 until March, 1956. The cage of Exhibit "A" was made of the more finished wire mesh as distinguished from the hardware cloth of the first five or six cages. It had a cylindrical shape and was considerably taller than its diameter. It rested in a pan which was supported by four iron rod legs and it had a flat wire mesh top. In the cage of Exhibit "A" was a simulated tree including an upright of rattan with branches of sika, a reed-like material. The original hardware cloth cages also had similar simulated trees in them.

In July of 1954 I began work on the securing of a wooden chuck with which to spin the bottom

pans from aluminum. Exhibit "B" is a paid invoice for a piece of 5-ply fir for a jig. This was purchased from Lounsberry and Harris, lumber dealers of Hollywood.

Exhibits "C" and "D" are paid bills from Pabu Rattan of Los Angeles dated July 30, 1954 and August 5, 1954, showing the purchase by me of bamboo and rattan poles and pieces of sika for cage trees.

Exhibit "E" is a sales slip from Art Westcott Company, dealers in cages and equipment for poultry and rabbits, of $\frac{1}{2}$ " by 1" mesh wire for making cages such as that shown in Exhibit "A." [67]

Exhibit "F" is a bill dated August 21, 1954 from R. L. Young of Los Angeles for work done primarily on the attempted production of a chuck for spinning the cage pans. Exhibit "G" is a paid invoice dated September 2 (the year is not given but it is in my records as a 1954 invoice) for the production of a turning chuck and the spinning of five sample parts or pans. Such a pan is shown in the attached photograph Exhibit "H," which shows the shiny spun aluminum pan and a somewhat different type of leg structure than that shown in the photograph Exhibit "A."

Exhibit "I" is another invoice from Pabu Rattan dated September 8, 1954 for rattan poles and sika (spelled seka in the invoice).

Exhibit "J" is a photostat copy of a paid invoice of Art Westcott Company dated September 24, 1954 for the purchase of $\frac{1}{2}$ " x 1" mesh wire and clips and clip pliers for use in making cages of the type shown in Exhibit "H," and subsequently for

making similar cages having slightly different details but generally embodying the design of Exhibit "H."

Exhibit "K" is a photostat copy of an invoice from Pacific Box and Salvage Company dated October 4, 1954 for 250 cartons which were used to ship the cages. Where delivery was made for local sale cartons were unnecessary. They were primarily used for out of town shipment.

Exhibit "L" attached hereto is a photostat copy of an invoice from Pabu Rattan dated October 6, 1954, for a rattan pole.

I first saw a cage made by Continental Cage Corporation of Los Angeles at a show at the Biltmore Hotel which took place September 24, 25 and 26, 1954, and this was the first time I had seen a Continental cage. I had been making and selling cages such as shown in Exhibits "A" and "H" since July, 1954, and I repeat that the cages made and sold by me were conceived by me and that shape and appearance was not secured from Continental Cage Corporation [68] or any other source.

/s/ HERMAN SHAPIRO.

Subscribed and sworn to before me this 3rd day of July, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public in and for said State and County.

My commission expires March 6, 1960. [69]

[Note: Exhibits are set out in Book of Exhibits.]

Proof of Service Attached. [82]

[Endorsed]: Filed July 9, 1956.

[Title of District Court and Cause.]

AFFIDAVITS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

In support of its Motion for Preliminary Injunction on file herein, Plaintiff submits the attached supplementary affidavits of John Graf and Maurice R. Lazarus.

Dated: At Los Angeles, California this 25th day of July, 1956.

/s/ THOMAS P. MAHONEY,
Attorney for Plaintiff. [83]

AFFIDAVIT OF JOHN GRAF

State of California,
County of Los Angeles—ss.

I, John Graf, being duly sworn, depose and say that I reside at 11271 Sardis Avenue, Los Angeles 64, California.

I have known Sidney Herman, the patentee of United States Letters Patent, Design 177326, since 1947 when he was working with my wife in Milwaukee, Wisconsin, and have known him substantially continuously since that time, except for a two-year period between 1949 and 1951.

In April, 1954, I was engaged in selling Bibles and, as a side line, was conducting a parakeet breeding aviary which I had established in the Fall of 1953. I made a practice of fabricating my own aviaries, using various types of wire to do so.

In April, 1954 I went to the Olympic Salvage Enterprises which is a used equipment store at 525 Olympic Boulevard in Santa Monica, California, and I bought two metal pans of cylindrical configuration which were approximately five inches deep and which had a flange on the upper edge thereof. There were two lips on the outside to lift the pans.

The reason I bought these pans is that I was considering making another wire bird cage for my parakeets and in April, 1954, I completed a bird cage which consisted of these pans resting on the floor and a cylindrical wire housing. The construction I made was distinguishable from the Herman patent No. Des. 177,326 in that there were no legs on the pan, the wire was of entirely different configuration, there was no rim on top, nor was there the grid at the top of the cage within the rim.

In April, 1954 I completed the cage and about that time I went over to Sid Herman's apartment at 3228 Sawtelle Boulevard, Los Angeles 64, California, to borrow a pair of Cherry-dykes metal cutters. I went up to his apartment and asked his wife where he was and she said he was in the garage but told me she didn't want me to go into the [84] garage and acted very secretive about what Sid was doing in the garage. She mentioned that the garage door was open. I ignored her request not to enter the garage and went in and saw Sid Herman working on a cylindrical bird cage. He was shaping $\frac{5}{8}$ x $\frac{5}{8}$ " mesh wire into a cylindrical shape. He had at his side a pan which he intended to use which consisted of an old barbecue stand with legs thereupon.

When I saw the cage I laughed because it struck me as coincidental that Sid would be working on a cage at the same time that I was working on a cage. Up to this time, Sid Herman had not seen the cage that I had completed, nor did he have any knowledge of the fact that I was building a cage. He couldn't understand why I was laughing at him and I didn't tell him.

Subsequently to that time, approximately in May, 1954, I gave Sid Herman a parakeet and I remember this fact because parakeets were scarce and expensive and I knew that my wife wouldn't like my giving a bird to anyone for nothing, even though they were good friends of ours. This was true since I was selling birds at \$4.50 a head wholesale.

At the time he was fabricating the cage I saw in April, Sid had a round sheet metal top to close off the top of the cylindrical enclosure. After I saw him working on this cage, and about May, 1954, I again visited the Herman garage and saw Sid spraying another cage of the same type with black paint using a vacuum cleaner attachment to do so. He had a pan of the same design and a sheet metal top and I particularly remember this incident because he sprayed black paint all over the garage and his wife became angry and threw a hammer at him.

At this time, Mrs. Herman was not friendly to me because of the fact that I had previously ignored her request to not enter the garage in April, 1954 when I saw Sid making a cage which, to my knowledge, was the first cage he had built.

At this time, Sid Herman, to my knowledge, was working selling Kirby vacuum cleaners and he was somewhat difficult to get ahold of. Thus, while I frequently visited his apartment at short intervals, he was not always in and I did not see him very often. [85]

Later on when I saw a completed cage in his house, it was painted black and had a branch in it. The cage was of the same appearance and configuration as those he was previously working on in his garage.

On or about July, 1954, the Hermans lost the parakeet which I had given them in May, 1954 and I replaced the lost parakeet with a yellow male parakeet. To my knowledge, Sid Herman had had the cage in his house sometime previously to that date and had kept in it the first parakeet I had given him.

/s/ JOHN GRAF.

Subscribed and sworn to before me this 25th day of July, 1956.

[Seal] /s/ MIRIAM H. AULD,
Notary Public in and for the above County and
State. My Commission Expires Aug. 31, 1958.

AFFIDAVIT OF MAURICE R. LAZARUS

State of California,
County of Los Angeles—ss.

I, Maurice R. Lazarus, being duly sworn, depose and say that I am the President of Custom Cage Corporation, a California corporation, doing busi-

ness at 1832 S. Sepulveda Boulevard, Los Angeles 25, California.

I am the brother-in-law of Sidney Herman, the patentee of United States Letters Patent, Design 177,326 and have known him continuously since 1940.

I have engaged in the manufacture of bird cages substantially similar in design to that shown in the aforesaid patent since August, 1954.

Prior to August, 1954, and probably in July, 1954, Sid Herman, on a visit to his house, showed me a bird cage which was painted black, which had a tree branch disposed in the center of it and which was substantially similar, to the best of my recollection, to that bird cage shown in Design Patent No. 177,326.

In August, 1954, I gave Sidney Herman a check to make a more commercially feasible model of his cage. Sid told me that he had made the cage in his garage and suggested that we get together to manufacture the cage and sell the same. At all times he gave me the impression that he had developed and invented the cage and never indicated in any way that he had copied the cage from anyone else.

The cage that Sid Herman built with the money I gave him was identical with the cage shown in patent No. 177,326, was painted black and was displayed by Merchants Pet Supply at the Biltmore Hotel pet show in September, 1954.

I looked at every booth at the show in September,

1954 and, to my knowledge, there was not shown any cage whatsoever which resembled the cage being shown by us. This cage was ultimately taken down to Germaine's and placed in their window. [87]

At the time the cage was shown at the show in 1954, a sand blasted Manzanita branch was housed within the cage to serve as a perch for birds and as a decorative element.

To my knowledge, at that time Pacific Cage and Screen Co. was not engaged in the sale and distribution of cages of the design shown in United States Letters Patent No. Des. 177,326 and only came in a substantial time later with copies of the design of the patent.

Sidney Herman and I jointly engaged in the manufacture and sale of such cages from August, 1954 to December, 1954, and I have continued to this date.

/s/ MAURICE R. LAZARUS.

Subscribed and sworn to before me this 25th day of July, 1956.

[Seal] /s/ MIRIAM H. AULD,
Notary Public in and for the above County and
State. My Commission Expires Aug. 31, 1958.

Affidavit of Service by Mail Attached. [89]

[Endorsed]: Filed July 26, 1956.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: July 31, 1956. At: Los Angeles, Calif.

Present: Hon. Thurmond Clarke, District Judge.

Deputy Clerk: Ed. J. Fisher. Reporter: None.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

Proceedings: Ruling on submitted matter:

It Is Hereby Ordered that the motion of the Plaintiff in the above named cases for preliminary injunction is granted.

Counsel for the prevailing party is directed to prepare and file appropriate order.

Counsel notified.

JOHN A. CHILDRESS,
Clerk,

By ED. J. FISHER,
Deputy Clerk. [90]

[Title of District Court and Cause.]

ANSWER

Defendants deny, admit and allege as follows:

1.

Defendants admit that plaintiff has a regular and established place of business at Culver City, California, but are without information as to fact and place of incorporation and therefore leave plaintiff to its proofs.

2.

Defendant Pacific Cage and Screen Co. admits the allegations of paragraph 2. The other defendants are without knowledge of the allegations thereof and leave plaintiff to its proofs thereon. [91]

3.

Defendant Pet Dealers Supply Company admits the allegations of paragraph 3 of the complaint. The other defendants are without knowledge of the allegations thereof and leave plaintiff to its proofs.

4.

Defendant Merchants Pet Supply Company admits the allegations of paragraph 4 of the complaint. The other defendants are without knowledge of the allegations thereof and leave plaintiff to its proofs.

5.

Defendant John Middelkoop admits the allegations of paragraph 5. The other defendants are without knowledge of the allegations thereof and leave plaintiff to its proofs.

6.

Defendants admit the allegations of paragraph 6.

7.

Defendants admit that United States Letters Patent No. Des. 177326 were issued to plaintiff on April 3, 1956, but deny that said Letters Patent were duly and legally issued. Defendants are with-

out knowledge that plaintiff now is the owner of said Letters Patent and leave plaintiff to its proofs.

8.

Defendants admit the allegations of paragraph 8.

9.

Defendant deny the allegations of paragraph 9.

For a Separate Answer and Defense to Said Complaint Defendants Affirmatively Allege As Follows:

10.

That the said Sidney Herman was not the original and first inventor or discoverer of any part of the alleged invention or improvement disclosed and claimed in said patent but that prior to November 1, 1954, and more than one year prior to said date said alleged invention was well known and used in the art, the following prior art being relied upon:

Prior Publications

Catalog No. 42, The Andrew B. Hendryx Co., 1930, pages 2a, 40, 49, 57 and 58,

Catalog, Pacific Coast Wire & Iron Works, August 1, 1938, page 11,

and other publications and disclosures which defendants are making search for and ask permission to present as soon as discovered.

11.

Defendants further aver that said patent No. Des. 177,326 is invalid because bird cages embody-

ing the features of the design disclosed in said patent were in public use and on sale in the United States for more than one year prior to the filing date of the application for said patent and in particular were manufactured and sold by Andrew B. Hendryx Co., Geo. H. Wahmann Mfg. Co. and others, and were shipped into the United States from China and used, sold and placed on sale by Harry Lachman of Los Angeles, California, and others, the names of whom defendants do not at present know but such names will be supplied by defendants upon determining them.

12.

That Sidney Herman, the applicant for the patent in suit, [93] purchased a cage embodying all of the substantial features of the design of said patent and subsequent to the purchase of said cage, said Sidney Herman made slight and unpatentable alterations in said design, making oath to said application and claiming all of the design as his invention and the patent therefore is void.

13.

That said patent in suit is invalid because it fails to describe and claim the alleged invention in "full, clear, concise and exact, terms required by the Patent Statutes, in that the description and claim of the patent fail to distinguish that portion of the design which said Sidney Herman considered to be new over the design of the cage which he purchased prior to his alleged invention of the design."

Wherefore, defendants pray that the complaint be dismissed and that they have judgment against plaintiff for their costs, disbursements and reasonable attorneys fees herein.

FRED H. MILLER,
ALLAN D. MOCKABEE,

/s/ By ALLAN D. MOCKABEE,
Attorneys for Defendants. [94]

Affidavit of Service by Mail Attached. [95]

[Endorsed]: Filed Aug. 10, 1956.

[Title of District Court and Cause.]

NOTICE OF HEARING

To: Continental Cage Corporation, Plaintiff, and Thomas P. Mahoney, attorney for Plaintiff;

You Are Hereby Notified and You Will Please Take Notice, that on Monday, September 10, 1956, at 2 P.M. in the courtroom of Hon. Thurmond Clarke, in the Federal Building at Los Angeles, California, defendants will present the attached Opposition to Plaintiff's Order for Preliminary Injunction.

FRED H. MILLER,
ALLAN D. MOCKABEE,

/s/ By ALLAN D. MOCKABEE,
Attorneys for Defendants. [96]

[Title of District Court and Cause.]

OPPOSITION TO PLAINTIFF'S ORDER FOR PRELIMINARY INJUNCTION

Now come defendants through their counsel and oppose plaintiff's proposed Order for Preliminary Injunction.

The proposed order is vague and indefinite in that under paragraph one thereof, defendants are unable to ascertain what designs of cages are intended to be included therein.

In paragraph one no reference is made to the top of the cage, which is different in the patented design than in any of defendants' products. If defendants manufacture and sell a cage as defined in paragraph one with any type of top design, whether or not it was the top design of the patent in suit, defendants would be violating the injunction.

The design defined in paragraph one of the proposed order defines a bird cage, all of the features of which are embodied in [97] cages prior to plaintiff's patent. Thus, according to the showing clearly made by defendants, the proposed order and injunction would prevent defendants from manufacturing and selling that which is clearly in the public domain. If defendants are entitled to manufacture and sell the design features in the public domain, there should be some provision in the case permitting defendants to do so and a clear understanding as to which of defendants' cages are free of the

injunction. There are no findings of fact or conclusions of law and defendants find it impossible to interpret an order such as the one proposed by plaintiff.

The proposed bond of \$1,000.00 is entirely inadequate. Defendants introduced evidence showing that plaintiff's patentee was not the inventor of the design in suit and that he copied the overall and basic design from one Robert Kleid after purchasing a cage from said Robert Kleid and asking Kleid about how it was manufactured and where he secured certain elements of the cage.

Defendants are of the firm opinion that it can clearly prove that plaintiff's patentee was not the inventor of the design in suit and that the patent in suit is invalid. Defendants have already suffered loss as a result of circularizing of defendants' customers and the loss to defendants as the result of the grant of a preliminary injunction will be irreparable. It cannot be measured in terms of lost sales during the time the injunction is in effect. To this loss must be added the entirely expected loss of dealer customers because of the injunction. Defendants have no way of measuring the loss which might be suffered by reason of a preliminary injunction but it is submitted that a bond in the amount of \$50,000.00 is within reason and should be required if it should eventually be determined that the injunction was improperly granted or if the patent is held invalid upon trial on the merits.

The bond which plaintiff must post covers costs and damages. Title 28 U.S.C. Sec. 382; *Heiser v.*

Woodruff, 128 F. 2d. [98] 178 C.C.A. 10, 1942; Utah Radio Products v. Boudette, 69 F. 2d 973 C.C.A. 1, 1934; Robinson v. Benbow, 298 F. 561 C.C.A. 4, 1924.

A preliminary injunction must be issued on the basis of findings of fact and in the absence of any findings will be vacated on appeal. "There are several reasons why this case cannot be considered here on the merits. The 'preliminary mandatory injunction' was interlocutory in nature and was issued by the Court without findings of fact, which are specifically required by Rule 52." Hopkins v. Wallin, 13 Fed. Rules Serv. 52a.2, Case 1; 179 F. 2d 136 C.C.A. 3, 1949. In this case the Court of Appeals held that the preliminary injunction was issued by the Court without proper foundation.

In National Savings & Trust Co. v. Schutack, 139 F. 2d 371 US Ct. of Appeals, DC, 1943, the Court denied a petition for instructions without making any finding to support its action and the judgment of the Court was reversed and remanded with instructions to find the facts specially and state separately its conclusions of law.

In Bank of Madison v. Graber, 158 F. 2d 137 C.C.A. 7, 1946, it was held that findings of fact and conclusions of law must be made on the granting of an interlocutory injunction and recitals in the restraining order itself cannot take their place. The Court of Appeals stated "Admittedly, there was no attempt to comply with Rule 52a of the Federal Rules of Civil Procedure which requires: "* * * the Court shall find the facts specially and state sepa-

rately its conclusions of law thereon * * *; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action'." The question is whether the injunction in the instant case should be sustained in the absence of such findings and conclusions. This Court in *Shannon v. Retail Clerks' National Protective Association*, 128 F. 2d 553 (6 Fed. Rules Serv. [99] 52a.2, Case 10, reversed such an order in part at least for failure to comply with this rule. The Court referring to the rule, stated (page 555); " 'These are strongly worded mandatory provisions which should be respected. They are not meaningless words'."

/s/ ALLAN D. MOCKABEE,

Attorney for Defendants. [100]

Acknowledgment of Service Attached. [104]

[Endorsed]: Filed Aug. 10, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Continental Cage Corporation, Plaintiff, and
Thomas P. Mahoney, Attorney for Plaintiff:

You Were Hereby Notified and You Will Please
Take Notice, that on Monday, September 10, 1956,
at 2 P.M. the defendants, by their attorneys, will
present the attached Motion for New Trial of Order
Granting Preliminary Injunction, in the courtroom

of Hon. Thurmond Clarke, in the Federal Building at Los Angeles, California.

FRED H. MILLER,
ALLAN D. MOCKABEE,

/s/ By ALLAN D. MOCKABEE,
Attorney for Defendants. [105]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL OF ORDER
GRANTING PRELIMINARY INJUNCTION

Now come defendants, through their counsel and move the Court for a rehearing of plaintiff's Motion for Preliminary Injunction which is treated as a motion for new trial under Rule 59 F.R.C.P. The reasons therefor are given below.

Defendants opposed Plaintiff's Motion for Preliminary Injunction by affidavits and evidence attached thereto and defendants also had witnesses present in Court for the purpose of testifying in opposition to plaintiff's motion.

Plaintiff's counsel made a brief statement in support of its motion in which he charged that one of the bird cages manufactured by defendants, on exhibit in the Court, was an infringement of plaintiff's patent and plaintiff thereupon rested.

Defendants' counsel began a discussion of defendants' [106] position and briefly outlined that defendants had shown that plaintiff's patentee was not the inventor of the design in suit; that plaintiff's patentee had secured substantially all of what

was shown in his patent from another; that the statement of one of plaintiff's affiants had further substantiated the fact that plaintiff's patentee had "conceived a more commercially feasible model of his cage." This was in August, 1954, after plaintiff's patentee had purchased a cage containing all the major features of the design in suit from Robert Kleid. Defendants' counsel also called to the attention of the Court some of the numerous exhibits accompanying defendants' affidavits and also presented to the Court the file wrapper of the application for the design patent in suit.

At this point the Court terminated further hearing on the matter and stated that it would take it under submission. The next day the Court announced by letter that it had reached its decision to grant the preliminary injunction.

Plaintiff's counsel had available in Court the Presidents of both defendants Customcraft Industries, Inc. and Pacific Cage and Screen Co. in the two actions. These witnesses were prepared to testify that they did not design their cages from cages of plaintiff and to give other evidence which would have further strengthened defendants' showing that plaintiff's patentee was not the inventor of the design in suit.

Plaintiff's counsel was prepared to argue that among other requirements for the grant of a preliminary injunction there must be a showing of irreparable injury to the plaintiff. *Sims v. Greene* 161 F. 2d 87 C.C.A. 3, 1947. Plaintiff entered the field with its cages after others had pioneered the

field and subsequent to the time that such others began the manufacture and sale of cages of the patented design, rightfully believing that the cage was one that could not be protected by a valid patent. Plaintiff has been, under such circumstances, manufacturing and selling cages in [107] competition with others in the field and apparently has been successfully so doing. Denial of the preliminary injunction will not alter plaintiff's competitive position nor cause it any harm. The grant of the injunction before trial will cause injury to defendants which can to a certain degree be measured but it will result in damage which cannot be estimated but which may be far in excess of provable damage. Defendants have already suffered loss by reason of the circularizing of defendants' customers by plaintiff, some of which circularizing has not been only the notification that there was alleged patent infringement but written statements by plaintiff which are obviously untrue and which were made deliberately with the intent to entice away customers of defendants.

It is submitted that there is no reasonable basis for the grant of a preliminary injunction based upon the patent in suit. Where questions of fact are seriously disputed the matter will be left for final hearing. *Lare vs. Harper & Bros.* 86 Fed. 481, 483, C.C.A. 3; *E. I. Horsman and Etna Doll Co. v. Cauffman*, 286 F. 372, C.C.A. 2 Cert. Den. 261 US 615; *Decorative Stone Co. v. Building Trades Council*, 13 F. 2d 123 C.C.A. 2 Cert. Den. 277 US 594.

If the validity of a patent has been neither ad-

judicated nor acquiesced in by the public a preliminary injunction will not be granted. *National Cash Register Co. v. Remington Arms Co.*, 283 F. 196 DC Del. affirmed 286 F. 367 C.C.A. 3.

The patent in suit issued April 3, 1956, a little over two months before suit was filed. It obviously has not been adjudicated in any prior litigation and it is just as clear that there has been no long acquiescence of its validity by the industry.

A design patent is not the same as a regular mechanical patent wherein new mechanical functions and structures are involved, and to obtain a valid design patent is exceedingly difficult as pointed out by the Second Court of Appeals in *Charles D. Bridgell, Inc. v. Alglobe Trading Corp.* 92 USPQ 100.

The file wrapper of the application for the patent in suit, defendants' Exhibit A for identification, clearly shows that the United States Patent Office did not have available any evidence of prior invention such as that proposed by defendants or any evidence that plaintiff's patentee had purchased a cage containing in all patentable respects, the elements of the design in suit before plaintiff's patentee conceived the idea of utilizing the Kleid design with the wire mesh of the 1930 Hendryx catalog (Babros affidavit exhibits) and the top metal band of the Hendryx catalog of 1930 (Babros affidavit exhibits).

At the time of the hearing on the Motion for Preliminary Injunction counsel for defendants did not have an opportunity to discuss certain of the law regarding patentability. Some of these points are outlined below.

The prime requisite to the validity of a design patent is that it be the product of invention. It is not sufficient that the design be novel, ornamental or pleasing to the eye. *Tourneau v. Tishman & Lipp*, 100 USPQ 350 DC N.Y.

The same exceptional talent is required for a design as for a mechanical patent. *Cornick v. Stry-Lenkoff Co.*, 107 USPQ 207 DC Ky.

A design patent must disclose inventive originality in design and ornamentation. Mere mechanical skill is no more sufficient to constitute inventive art in the case of the design artist than in the case of the engineer. *Capex Company v. Swartz*, 166 F. 2d 5 C.C.A. 7; *Western Auto Supply Co. v. American-National Co.*, 114 F. 2d 711 C.C.A. 6; *Cavu Clothes v. Squires, Inc.*, 184 F. 2d 30 C.C.A. 6.

A design patent must be possessed of novelty. The adaptation of old devices to new purposes, however convenient or useful they may be in their new role, is not invention. *Western Auto Supply Co. vs. American-National Co.* Supra; *Imperial Glass Co. v. A. H. Heisey & Co.*, 294 F. 267 C.C.A. 6. [109]

All that plaintiff's patentee did was to take the old overall design of the cage which he purchased from Robert Kleid and added to it the specific shape of mesh shown in the Hendryx catalog cage of 1930 in the affidavit of Babros, the vertically elongated mesh appearance of the Chinese cages in the photographs in the affidavit of Lachman and the upper metal band of the 1930 Hendryx catalog cages in the affidavit of Babros. To this he also added a square

mesh top which is not found in any of the accused cages. Even this is shown to be old in the Hendryx catalog of 1930 above referred to.

The degree of difference required to establish novelty is such that it must be a new design and not a modified or already existing design. Application of Johnson 175 F. 2d 791 C.C.P.A.; Application of Abrams 205 F 2d 202 C.C.P.A.

As to the design novelty of providing a cylindrical wire cage with a bottom pan supported by three legs and a wire mesh flat top with a band about the top, reference is made to the accompanying affidavit of Allan D. Mockabee. Attached to the affidavit is page 8 of Geo. H. Wahmann Manufacturing Co. Catalog which shows cage LC-32 containing the design features referred to and a letter from C. Harry Wahmann dated July 2, 1956 addressed to the affiant. The letter states that cage LC-32 has been manufactured by Geo. H. Wahmann Manufacturing Co. since 1923; that cage LC-32/B which shows a deep bottom pan has been made since 1925; and that cage LC-139 which has a deep bottom pan flange and a separate pan in which the cage is supported has been manufactured since 1934.

The fact that a design may be distinguished from those found in the prior art does not import the required novelty and ornamentation. Its overall aesthetic effect must represent a step which has required inventive genius beyond the prior art. *Burgess Vibrocrafters v. Atkins Industries*, 204 F. 2d 311 C.C.A. 7.

Defendants, in their opposition to plaintiff's Motion for [110] Preliminary Injunction filed July 9, 1956, cite other law in support of their contention that a preliminary injunction should not be granted in a patent case unless the patent has previously been adjudicated and found valid; that a patent applied for by one who is not the inventor is void; where defendants' affidavits and exhibits raise issue as to validity and plaintiff's proofs fail to show public acquiescence.

Not only has defendant raised an issue as to validity with regard to non-inventorship and lack of invention and novelty, but when these issues were raised, plaintiff filed counter affidavits, neither of which overcame the issues raised by defendants and in fact the counter affidavit of Lazarus presented by plaintiff further substantiated defendants' position that plaintiff's patentee was not the inventor of the design in suit. It is highly significant that plaintiff did not originally furnish an affidavit from plaintiff's patentee and it is even more significant that in filing counter affidavits, plaintiff again failed to furnish an affidavit from plaintiff's patentee.

It is respectfully submitted that upon reconsideration of the several issues raised and proofs made by defendants, it will become apparent that the present case is far removed from that type of case upon which preliminary injunction is granted. The Federal Rules of Civil Procedure and the decisions of the courts have laid down definite rules and quali-

fications for the granting of a preliminary injunction and these rules and decisions completely support the defendants. Denial of the preliminary injunction is therefore requested.

/s/ ALLAN D. MOCKABEE,
Attorney for Defendants. [111]

[Title of District Court and Cause.]

AFFIDAVIT OF ALLAN D. MOCKABEE

State of California,
County of Los Angeles—ss.

Allan D. Mockabee, being duly sworn, deposes and says:

That he is one of counsel for defendants in the above entitled action.

That on June 28, 1956, affiant wrote to Geo. H. Wahmann Manufacturing Co., Baltimore, Maryland, asking if that company had any old catalogs showing animal cages such as those pictured in the attached photograph of page 8 found by affiant in the Wahmann catalog of September 1, 1954.

In response to the said letter of June 28, written by affiant, a reply was received and a photostat copy thereof is attached hereto. It is dated July 2, 1956, and states that the [112] Wahmann Company has no catalogs in stock earlier than the catalog of September 1, 1954. C. Harry Wahmann, the writer of the letter stated that he could testify that his company has been making cage No. LC-32 since

1923, cage No. LC-32/B since 1925 and cage No. LC-139 since 1934.

/s/ ALLAN D. MOCKABEE.

Subscribed and sworn to before me this 9th day of August, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public. My commission expires Mar. 6,
1960. [113]

[Note: Exhibits are set out in Book of Exhibits.]

Acknowledgment of Service Attached. [114]

[Endorsed]: Filed Aug. 10, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFEND-
ANTS' OPPOSITION TO PLAINTIFF'S
ORDER FOR PRELIMINARY INJUNC-
TION

Now comes plaintiff, through its attorney, and objects to defendants' opposition to plaintiff's proposed order for preliminary injunction.

The opposition to the order is based on the following grounds:

1. That the order is vague and indefinite in that defendants are unable to ascertain what designs of cages are intended to be included therein;

2. Defendants insist that specific reference should be made to the top of the cage because it is allegedly different in the patented design than in any of defendants' products;

3. That the proposed bond is entirely inadequate; and

4. That the defendants are of the opinion that it can clearly be proved that plaintiff's assignor was not the inventor of the design in suit. [118]

It should be pointed out that the defendants make no attempt to establish noninfringement of the patent in issue here and it is plaintiff's position that such a contention could not fairly be made in view of the manifest and flagrant infringement of the patent.

In considering the first contention of the defendants, it should be pointed out that the first paragraph of the order clearly defines the design of the cage which is the subject matter of the patent in issue specifying, as it does, the various design elements which are to be found in all of the infringing cages manufactured and sold by defendants.

In relying on the second contention, the defendants advert to the slight distinction between the showing in the patent drawing of the top of the cage and the tops of the defendants' cages. It is submitted that the Court had before it the cage manufactured and sold by the defendants and was able to view the cages during the argument by counsel for defendants. As a matter of fact, defendants' counsel pointed out the slight distinctions to the Court and showed the Court a copy of the patent in issue. It must be presumed, therefore, that the Court made its order granting the preliminary injunction with this slight difference in mind.

As will be shown in the appended memorandum

of points and authorities, the law is well established that slight variations between the design of the patent and the design of the infringing product do not avoid infringement.

Considering the third contention of the defendants relating to the bond, it is manifest from the decisions of the courts that the amount of the bond is entirely within the discretion of the Court and that the Court, if it desires, can refuse to grant any bond whatsoever. The attempt of the defendants to persuade the Court to establish a bond in the sum of Fifty Thousand Dollars (\$50,000.00) is based upon no affidavits as to the present manufacture and sale of the infringing articles by the defendants and it is submitted that the bond prescribed by the Court [119] is adequate in the premises.

So far as defendants' opinion as to the prior inventorship of the invention in suit by the plaintiff's assignor is concerned, it is manifest that the Court had before it the alleged prior structure manufactured by Robert Kleid and also had before it the affidavits supporting the prior inventorship by plaintiff's assignor. Therefore, it is submitted that the Court has thoroughly considered this question and there is no basis for objection to the order by defendants.

Dated: At Los Angeles, California this 17th day of August, 1956.

/s/ THOMAS P. MAHONEY,

Attorney for Plaintiff. [120]

Affidavit of Service by Mail Attached. [125]

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANTS' MOTION FOR NEW TRIAL

Now comes the plaintiff, through its attorney, and opposes defendants' motion for new trial.

The Court, in its hearing on plaintiff's motion for preliminary injunction, had before it the following:

1. A copy of the file history of the patent in issue together with the references cited by the United States Patent Office in initially rejecting the application upon which the patent is based;
2. A copy of the patent in issue;
3. An example of the bird cage manufactured and sold by plaintiff in accordance with the teachings of its patent;
4. A bird cage manufactured and sold by defendants;
5. Also present in the courtroom was an alleged anticipatory bird cage assertedly manufactured in accordance with the alleged prior invention of Robert Kleid. [126]

In the affidavits submitted in support of the motion for preliminary injunction were assertions that irreparable harm was being caused to plaintiff by the infringing acts of defendants and in the Otis affidavit of July 6, 1956 were averments that the cage of the patent was the mainstay of plaintiff's business, while it was apparent from the exhibits submitted by the defendants that they were engaged in the sale of many other types of cages. There-

fore, plaintiff has obviously made a showing of irreparable harm.

It is submitted that the Court, by virtue of its consideration of all of the matters set forth hereinabove, was justified in its ruling for preliminary injunction and that no new bases have been set forth by the defendants which would compel the Court to grant a new hearing to defendants on defendants' motion for new trial.

As evidenced by the appended memorandum of points and authorities, the Court, given the opportunity to review the evidence before it in its original hearing, had the discretion to grant plaintiff's motion. Therefore, it is earnestly submitted that defendants' motion for a new trial should be denied.

Dated: At Los Angeles, California this 17th day of August, 1956.

/s/ THOMAS P. MAHONEY,
Attorney for Plaintiff. [217]

Affidavit of Service by Mail Attached. [132]

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH H. BABROS

State of California,
County of Los Angeles—ss.

Joseph H. Babros, being first duly sworn, deposes and says:

I am the President of the defendant Pacific Cage

and Screen Co. and am a resident of Los Angeles County, California.

Based upon an estimated monthly average of sales of the "Coronado" bird cage produced by Pacific Cage and Screen Co. and accused by plaintiff as an infringement of its design patent No. Des. 177,326, it is estimated that the gross received for the manufacture and sale of said "Coronado" cages during the year 1955 was in the neighborhood of One Hundred and Fifty Thousand Dollars (\$150,000.00).

Attached hereto is a report from Dun and Bradstreet which was received by me directly from that firm and shows that plaintiff's [133] financial condition is very poor and plaintiff would be unable to pay damages which might result in the event a preliminary injunction is granted against defendants and the merits of plaintiff's action are found to be groundless.

/s/ JOSEPH H. BABROS.

Subscribed and sworn to before me this 6th day of September, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public. My Commission Expires March 6,
1960.

[Endorsed]: Filed Sept. 10, 1956. [134]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Sept. 13, 1956. At: Los Angeles, Calif.
Present: Hon. Thurmond Clarke, District Judge.
Deputy Clerk: E. J. Fisher. Reporter: None.
Counsel for Plaintiff: No appearance.
Counsel for Defendant: No appearance.
Proceedings: Ruling on submitted matter:

It Is Hereby Ordered that order of July 31, 1956, allowing issuance of Preliminary Injunction, to stand, after hearing motion of defendants and objections thereto on Sept. 10, 1956.

Counsel notified.

JOHN A. CHILDRESS,
Clerk,

By E. J. FISHER,
Deputy Clerk. [135]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on before the Honorable Court on Defendants' Opposition to Plaintiff's Order for Preliminary Injunction, and Defendants' Motion for New Trial of Order Granting Preliminary Injunction, the Court does make the following findings of fact and conclusions of law:

Findings of Fact

I.

This is a suit under the patent laws of the United States charging defendants with infringement of United States Letters Patent No. Design 177,326 issued to Sidney Herman for "Bird Cage".

II.

The plaintiff Continental Cage Corporation is the owner of legal title to the patent in suit.

III.

The defendants, Pacific Cage and Screen Co., Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop, are residents of Los Angeles County, California. [136]

IV.

The bird cages manufactured and sold by defendant Pacific Cage and Screen Co. and sold by Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop which the plaintiff alleges infringe the patent in suit here, were exhibited to the Court on plaintiff's motion for preliminary injunction. On the hearing for preliminary injunction, defendants' counsel presented to the Court a copy of the patent in issue and a copy of the file wrapper thereof.

Also presented to the court was an allegedly anticipatory structure manufactured by one, Robert Kleid.

V.

On plaintiff's motion for preliminary injunction, defendants responded vigorously with contentions of invalidity based on prior invention.

VI.

Defendants also based their avoidance of the charge of infringement of the patent on various minute differences between the alleged infringing structures and the showings of the patent.

VII.

The cage shown and claimed in the Herman patent in suit is constituted by an elongated cylindrical enclosure, said enclosure being defined by a plurality of vertical rods maintained in operative relationship with each other by relatively widely spaced, horizontally oriented rings. The top of the cage is surmounted by a sheet metal flange which depends below the top of the cylinder and encloses the same and which extends at right angles to the depending flange. The bottom of the cage is constituted by a sheet metal pan in which the lower end of the cylinder rests and said sheet metal pan is disposed in spaced relationship with the surface upon which the cage rests by means of a plurality of legs secured to the sheet metal pan.

VIII.

It is apparent from the affidavits of the parties and arguments of counsel that the cage of the invention has, in a short time, attained a [137] sur-

prisingly dominant economic position in the bird cage field by virtue of its novel appearance and unusual attractiveness of design. As a matter of fact, the cage of the patent achieves a surprisingly novel design by a combination of elements found in the prior art but not previously assembled in the distinctive manner exemplified and shown in the patent in suit.

IX.

The infringing cages manufactured and sold by defendants include an elongated cylindrical enclosure, said enclosure being defined by a plurality of vertical rods maintained in operative relationship with each other by relatively widely spaced, horizontally oriented rings. The top of the infringing cages is surmounted by a sheet metal flange which depends below the top of the cylinder and encloses the same and which extends at right angles to the depending flange. The bottom of the infringing cage is constituted by a sheet metal pan in which the lower end of the cylinder rests and said sheet metal pan is disposed in spaced relationship with the surface upon which the cage rests by means of a plurality of legs secured to the sheet metal pan. The distinctions in appearance between defendants' infringing cages and that shown in the patent are of a minor nature and such as to be incapable of permitting an ultimate consumer to adequately distinguish defendants' cages from those manufactured in accordance with the teachings of plaintiff's patent.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter of this action and the parties hereto.

II.

Plaintiff is entitled to a preliminary injunction whereby defendants, and each of them, are enjoined during the pendency of this action against manufacturing and selling infringing cages of the character set forth in the Order previously filed by plaintiff and as set forth in the Writ of Injunction filed simultaneously therewith. [138]

III.

The bond set by the Court is adequate in the premises.

IV.

Writ of Injunction shall issue forthwith.

Dated: Sept. 27, 1956.

/s/ THURMOND CLARKE,
Judge. [139]

Acknowledgment of Service attached.

[Endorsed]: Lodged Sept. 20, 1956. Filed Sept. 27, 1956.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Now come the defendants through their counsel and notify the plaintiff that hearing on defendants'

objections to plaintiff's Proposed Findings of Fact and Conclusions of Law will be had in the courtroom of Judge Thurmond Clarke, Federal Building, Los Angeles, California, on Monday, October 22, 1956, at 10:00 a.m. or at such time thereafter as the court may designate.

Defendants object to plaintiff's Proposed Findings as follows:

I.

Regarding proposed finding IV of plaintiff, line 8, after "thereof" should be added—, the file wrapper having been accepted by the court without discussion thereof by counsel for either party—; line 10, after "Kleid" should be inserted—which was not retained by the court when it took the matter of the preliminary injunction under advisement—. [140]

Finding IV of plaintiff is objected to since it implies that the file wrapper of the patent of plaintiff was in some way discussed by counsel or otherwise presented to the court whereas in fact there was no discussion of the file wrapper.

Finding IV is further objected to because it does not show that the Robert Kleid cage was not retained by the court when it took the matter of the injunction under advisement.

II.

Proposed finding V is objected to. The word "vigorously" in line 13 does not truly set forth the situation as it occurred. Defendants were given but a short time to present remarks regarding the Mo-

tion for Preliminary Injunction and no opportunity was had to present many of the points which, as defendants stated in the hearing on the Motion for Re-hearing, defendants' counsel was not given the opportunity to present at the first hearing.

III.

Finding VI is objected to since it should be supplemented by the addition of —and defendants also maintained that there was as much difference between the accused structure and the patent as there was difference between the patent and the prior art—.

IV.

Finding VII is objected to on the ground that in lines 22 and 23 where it states that the sheet metal flange depends below the top of the cylinder and “encloses the same” is ambiguous if not mis-descriptive. The inference is that the sheet metal flange completely closes the end of the cylinder. Actually, its vertical portion lies about the upper end of the side wall of the cylinder and does not enclose the cylinder. It might be stated that it encircles the end of the cylinder.

Further objection to proposed finding VII is based upon the fact that it completely leaves out any definition of the top of the [141] cage. The top, in the Herman patent, is of small square wire mesh and it is not made of the same material as the cylinder side wall.

With further reference to proposed finding VII, the legs should be more particularly described in re-

lation to their connection with the pan. In the proposed wording, there is the implication that the patent in suit would cover a planter cage wherein a planter pan is disposed below the cylinder supporting pan.

IV.

Proposed finding VIII is objected to on the ground that there has been no proof submitted that the cage of the patent in suit, according to the showing in the drawing, has been manufactured and sold or that any efforts of plaintiff in the production and sale of bird cages has caused the design of the Herman patent to attain any degree of economic dominance in the bird cage field.

Proposed finding VIII further is objected to on the ground that practically in its entirety the combination of elements is found in the prior art and previously assembled in the manner exemplified and shown in the patent in suit.

V.

Proposed finding IX is objected to on the ground that all of the features recited therein are found in the prior art and therefore cannot be a basis for a finding of infringement. Furthermore, this proposed finding does not include any top design whatsoever and the sheet metal flange does not enclose the cylinder as stated in the finding.

Furthermore, the finding, in the last sentence thereof, should include a statement to the effect that the distinctions between the patented cage and the prior art are not greater than the distinctions be-

tween the accused structure and the design of the patent. [142]

Conclusions of Law

I.

Proposed conclusion II is objected to on the ground that the definition of the structure of the design infringed as set forth by plaintiff is far too inclusive and indefinite to permit defendants to determine its extent.

II.

Conclusion III is objected to. Plaintiff is an insolvent corporation. Defendants are responsible manufacturers and the damages they will suffer by reason of the grant of a preliminary injunction clearly will be greater than the amount of the One Thousand Dollar (\$1,000.00) bond. In a circumstance such as this defendants cannot recover from plaintiff damages exceeding the amount of the bond. The bond was set without any hearing as to what a reasonable bond should be and a subsequent showing by defendants clearly indicates that a considerably higher bond should in all equity be required.

III.

Conclusion IV is objected to on the ground that the patent in suit has never been adjudicated valid, there has been no acquiescence in its validity by the trade, there is a serious question of fact in the case with regard to validity and there is another serious question of fact as to whether the patentee is in fact the inventor of the cage and whether he know-

ingly executed his Oath in his patent application with the full knowledge that he was not the inventor thereof.

/s/ ALLAN D. MOCKABEE,

Counsel for Defendants. [143]

Affidavit of Service by Mail attached. [144]

[Endorsed]: Filed Sept. 28, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendants Pacific Cage and Screen Co.; Pet Dealers Supply Company; Merchants Pet Supply Company; and John Middelkoop hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the United States District Court, Southern District of California, Central Division, of July 31, 1956, which was affirmed and entered after rehearing on September 13, 1956, after hearing on motion of defendants for rehearing on September 10, 1956, said order directing that a preliminary injunction issue against said defendants.

This appeal is taken under the provisions of Title 28 United States Code, Section 1292.

A cash bond for costs in the amount of Two Hundred and Fifty Dollars (\$250.00) is posted concurrently with the filing of this Notice of Appeal.

/s/ ALLAN D. MOCKABEE,

Attorney for Defendants. [145]

[Endorsed]: Filed Oct. 2, 1956.

[Title of District Court and Cause.]

STATEMENT OF DEPOSIT OF CASH BOND

The defendants, Pacific Cage and Screen Co., Pet Dealers Supply Company, Merchants Pet Supply Company and John Middelkoop, having filed a Notice of Appeal from the United States District Court for the Southern District of California, to the Court of Appeals for the Ninth Circuit in the above entitled action, there is deposited herewith with the Clerk the sum of Two Hundred Fifty (\$250.00) Dollars in the form of a certified check, as cash bond on appeal required under Rule 73(c).

The owner of said sum of Two Hundred Fifty Dollars is the defendant Pacific Cage and Screen Co. The condition of the bond is to secure the payment of costs if the appeal is dismissed or the judgment affirmed or of such costs as the Appellate Court may award if the judgment is modified.

The said sum is hereby subjected to the provisions of Local [146] Rule 8(c).

/s/ ALLAN D. MOCKABEE,
Attorney for Defendants-
Appellants.

State of California,
County of Los Angeles—ss.

Personally appeared before me, Allan D. Mockabee, known to me to be the attorney for the defendant in the above entitled action and acknowl-

and John Middelkoop having been represented by counsel,

It Is Ordered:

I.

That a writ of injunction be issued herein restraining and enjoining the defendants, Pacific Cage and Screen Co., Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop, their officers, agents, directors, attorneys, and all persons in privity with them, or any of them, until the further order of this Court, from:

1. Making, using, or selling bird cages which infringe United States Letters Patent, Design 177,326 and which include an elongated, cylindrical body provided with a plurality of spaced cylindrical [148] rods maintained in operative relationship with one another by widely spaced horizontally oriented rings, said body being supported at its lower extremity in a relatively deep sheet metal pan which, in turn, is supported upon three wrought iron legs, and said body being provided at its upper extremity with a sheet metal ring or cap having a cylindrical depending flange and a horizontally oriented flange overlying the top of the body.

2. Making, using or selling Coronado model bird cages presently being manufactured by Pacific Cage and Screen Co. and being sold through Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop.

II.

That a bond of One Thousand Dollars (\$1,000.00) be posted as a requirement for the issuance of this Preliminary Injunction by this Court to make good to defendants Pacific Cage and Screen Co., Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop any damages which they may prove that they have suffered by reason of the issuance of said injunction if it shall eventually be held that said injunction was improvidently granted.

It Is So Ordered:

Dated: Aug. 31, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

Above order signed October 5th, 1956 nunc pro tunc as of August 31, 1956.

/s/ THURMOND CLARKE.

Disapproved as to form. Objections to be filed in three days.

/s/ ALLAN D. MACKABEE,
Attorney for Defendants.

August 6, 1956. [149]

[Endorsed]: Lodged Aug. 7, 1956. Filed Aug. 31, 1956. Nunc Pro Tunc Oct. 5, 1956. Docketed and Entered Oct. 5, 1956.

[Title of District Court and Cause.]

APPLICATION FOR ORDER FIXING THE AMOUNT OF SUPERSEDEAS BOND

The defendants having filed their notice of appeal from the order for preliminary injunction entered herein on October 2, 1956, and having posted a cash bond in the amount of Two Hundred Fifty Dollars (\$250.) concurrently therewith, now make application to the Court for a supersedeas bond staying the preliminary injunction pending the appeal and apply to the Court for an order fixing the amount of said bond in accordance with Rule 73(d).

/s/ FRED H. MILLER,
Attorney for Defendants.

ORDER

Upon the foregoing application, It Is Hereby Ordered that the preliminary injunction issued herein be stayed pending the defendants' appeal upon the posting by the defendants of a bond in the amount of One Thousand Dollars [151] (\$1,000.) conditioned for the satisfaction of the judgment in full, together with costs, interests, and damages for delay if for any reason the appeal is dismissed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interests, and damages as the Appellate Court may adjudge and award, said stay to continue in effect until such time as the mandate of the Appellate

Court is spread upon the minutes of this Court or defendants' appeal is otherwise terminated.

Dated: This 19th day of October, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

[Endorsed]: Filed Oct. 22, 1956.

[Title of District Court and Cause.]

STIPULATION DESIGNATING CONTENTS
OF RECORD ON APPEAL

Pursuant to Rule 75(f) of the Federal Rules of Civil Procedure, the parties hereto, through their counsel, hereby designate for inclusion in the Record on Appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed October 2, 1956, the following portions of the record, proceedings and evidence in this action:

1. The Complaint,
2. The Answer,
3. Plaintiff's Motion for Preliminary Injunction,
4. Affidavit of Robert M. Otis in Support of Plaintiff's Motion for Preliminary Injunction,
5. Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, [153]
6. Affidavit of Robert Kleid,
7. Affidavit of Joseph H. Babros and attached Exhibits A through A-5, B, C, C-1, D and D-1,
8. Affidavit of Harry Lachman with Exhibits A through H,

9. Affidavit of Solveig Kennedy,
10. Affidavit of John Jamieson,
11. Affidavit of Michael A. Capobianco,
12. Affidavit of Herman Shapiro with Exhibits A through L.
13. Copy of Design Patent Des. 177,326 of April 3, 1956, to Sidney Herman on "Bird Cage", the patent in suit,
14. Photograph of Plaintiff's Commercial Structure,
15. Photograph of Defendants' Accused Structure,
16. Photograph of Cage of Robert Kleid,
17. File Wrapper of Patent in Suit Including Prior Art References Cited by Patent Office,
18. Supplementary Affidavit of Robert M. Otis of July 6, 1956,
19. Affidavit of James S. Hanks of July 6, 1956,
20. Affidavit of George J. Meyer of July 6, 1956,
21. Affidavit of Albert A. Ardmore of July 6, 1956,
22. Affidavit of John Graf of July 25, 1956,
23. Affidavit of Maurice R. Lazarus of July 25, 1956,
24. Order for Preliminary Injunction,
25. Opposition to Plaintiff's Order for Preliminary Injunction,
26. Plaintiff's Objections to Defendants' Opposition to Plaintiff's Order for Preliminary Injunction,
27. Minute Order for Preliminary Injunction, July 31, 1956,

28. Motion for New Trial of Order Granting Preliminary Injunction.

29. Affidavit of Allan D. Mockabee of August 9, 1956, including letter of Geo. H. Wahmann Manufacturing Co., July 2, 1956 and page 8 of Wahmann catalog of Sept. 1, 1954, [154]

30. Plaintiff's Opposition to Defendant's Motion for a New Trial,

31. Minute Order, U. S. District Court, September 13, 1956, Affirming Order for Preliminary Injunction,

32. Findings of Fact and Conclusions of Law,

33. Opposition to Findings of Fact and Conclusions of Law,

34. Affidavit of Joseph H. Babros September 6, 1956,

35. Notice of Appeal,

36. Statement of Deposit of Cash Bond,

37. Application for Order Fixing the Amount of Supersedeas Bond,

38. Statement of Deposit of Cash Supersedeas Bond.

It is stipulated by and between the parties hereto, through their attorneys, that the plaintiff shall pay for the cost of printing only Items 4, 13 and 18 through 23 inclusive, as set forth hereinabove.

Dated this 5th day of November, 1956.

/s/ THOMAS P. MAHONEY,
Attorneys for Plaintiff.

/s/ ALLAN D. MOCKABEE,
Attorneys for Defendant. [155]

[Endorsed]: Filed Nov. 6, 1956.

[Title of District Court and Cause.]

CONCISE STATEMENT OF
POINTS ON APPEAL

Defendants-Appellants make the following statement of points on which they intend to rely on appeal:

That the trial court erred in each of the following respects:

1.

In granting a preliminary injunction on a newly issued design patent which has never been adjudicated or acknowledged to be valid by any one.

2.

In granting a preliminary injunction where defendants presented a serious and disputed question of fact to the effect that the patentee of the design patent in suit was not the inventor and that said patentee had actual knowledge that he was not the [159] inventor at the time he made application for the patent in suit.

3.

In granting a preliminary injunction where there was presented a serious question of fact as to the validity of the design patent in suit, based upon anticipatory prior art not considered by the Patent Office in granting the design patent.

4.

In summarily ordering defendants to cease the manufacture and sale of the accused design of bird

cage by preliminary injunction and permitting plaintiff, a company in poor financial condition, to post an entirely inadequate bond.

5.

In wording the preliminary injunction too broadly.

Dated in Los Angeles, California, this Ninth day of January, 1957.

HAZARD & MILLER,
FRED H. MILLER,
ALLAN D. MOCKABEE,

/s/ By ALLAN D. MOCKABEE. [160]

Affidavit of Service by Mail attached. [161]

[Endorsed]: Filed Jan. 9, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the Above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 161, inclusive, containing the original

Complaint;

Affidavits in Support of Plaintiff's Motion for Preliminary Injunction;

Opposition to Plaintiff's Motion for Preliminary

Injunction; (together with affidavits in support thereof & exhibits);

Additional Affidavits in Support of Plaintiff's Motion for Preliminary Injunction;

Answer;

Notice of Hearing of Opposition to Plaintiff's Order for Preliminary Injunction;

Notice of Motion for New Trial of Order Granting Preliminary Injunction;

Plaintiff's Objections to Opposition to Plaintiff's Order for Preliminary Injunction;

Plaintiff's Objections to Defendants' Motion for New Trial;

Affidavit of Joseph H. Babros;

Findings of Fact and Conclusions of Law;

Objections to Findings of Fact & Conclusions of Law;

Notice of Appeal;

Order for Preliminary Injunction;

Application for Order Fixing The Amount of Supersedeas Bond;

Stipulation Designating Contents of Record on Appeal;

Order Extending Time for Filing Record and Docketing Appeal;

Stipulation Extending Time for Filing Record and Docketing Appeal;

Concise Statement of Points on Appeal; and a full, true and correct copy of the Minutes of the Court on July 31, 1956; September 13, 1956;

B. Exhibits: File Wrapper and Contents of Design Patent #177,326, granted April 3, 1956.

Drawing of Design #177,326

Photograph of Plaintiff's Commercial Structure

Photograph of Cage of Robert Kleid

Photograph of Defendants' Accused Structure.

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of said District Court, this 25th day of February, 1957.

[Seal] JOHN A. CHILDRESS,

/s/ By CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15454. United States Court of Appeals for the Ninth Circuit. Pacific Cage and Screen Co., a corporation, Pet Dealers Supply Company, a corporation, Merchants Pet Supply Company, a corporation and John Middelkoop, Appellants, vs. Continental Cage Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 26, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15454

PACIFIC CAGE AND SCREEN CO., a corporation;
PET DEALERS SUPPLY COMPANY, a corporation;
MERCHANTS PET SUPPLY COMPANY, a corporation; and
JOHN MIDDELKOOP, Appellants,

vs.

CONTINENTAL CAGE CORPORATION, a corporation,
Appellee.

ADOPTION OF STATEMENT AND
DESIGNATION IN RECORD

Appellants hereby adopt the statement of points on appeal and stipulated designation of record appearing in the typewritten record.

/s/ ALLAN D. MOCKABEE,
Attorney for Appellants.

[Endorsed]: Filed March 1, 1957. Paul P. O'Brien, Clerk.